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P. Robt Cockburne

July 29. 1766.

30th July 1766
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Unto the Right Honourable the Lords of Council and Session,

THE PETITION

OF

ROBERT COCKBURN of Kirkton,

Humbly ſheweth,

THAT the petitioner ſet the lands of Over Hillhead to William Fleming, for nine years from and after the term of Martinmas 1759, which is declared to be his entry to the arable lands, and to the houſes, graſs, and yards, at the Whitſunday following; and Fleming thereby became bound to pay L. 19 Sterling of rent yearly, by equal portions, at Whitſunday and Martinmas. Fleming entered to the poſſeſſion, and thereafter died; and his oldeſt ſon William Fleming, a minor, under the management of his mother Janet Paterſon, entered to, and continued the poſſeſſion of ſaid lands of Over Hillhead.

That neither the father nor his ſon performed their part of the tack by payment of the rent; which laid the petitioner under the diſagreeable neceſſity, in ſpring 1764, of bringing a proceſs againſt William the ſon, and Janet Paterſon his mother and adminiſtratrix, before the ſheriff of Lanark, that as they had failed in payment of the rent from the commencement of the tack, *viz.* for four years, they ſhould be decerned in payment of theſe bygone tack-duties, and for damages and expences: And it ought to be found and declared, That they had forfeited any

A claim

ye farm of Over hill head roused on ye 7th Janry 1764: Janet Paterson ye highest offerer for ye same & preferred.
in Spring 1764 raised ye proces for ye rent & Sept 15. 1759 carried ye same convoy
2 wheels ye meaning of all this.

claim or right they had to the tack, and to remove at the next term of Whitſunday, or to find caution for the arrears, and for payment of the rent in time coming.

That William Fleming and his mother appeared by their procurator, and pleaded a no-proceſs. That there had been no edictal citation againſt the tutors and curators of William. But as it was not alledged that he had either tutors or curators, and indeed it was notorious that he had none, the ſheriff-ſubſtitute allowed the edictal citation to be executed and reported *cum proceſſu:* which accordingly was done. Theſe defenders thereafter ſtated two defences: That they were interpelled from payment by a proceſs of mails and duties, and decreet obtained therein againſt the father, at the inſtance of William Baillie of Roſehall: 2*do*, That Janet Paterſon had made offer of payment of the rent to the petitioner, upon being relieved of Mr Baillie's decree; but that the petitioner had refuſed to accept of payment, or to relieve.

That the anſwer to the ſecond defence was a denial of the charge: That Janet Paterſon had indeed offered a trifling part of the rent, but never had made tender, nor ever had been in condition to pay the arrears incurred. And as to the firſt, he produced a letter from Robert Gray factor to Mr Baillie, who *eo nomine* obtained the ſaid decreet of mails and duties before the ſheriff of Lanark, conſenting and agreeing for Mr Baillie, and authoriſing the ſaid proceſs for payment and removing; " and " that the ſame ſhould be an exoneration and liberation to the " defenders from the ſaid decreet of mails and duties, which I, " *i. e.* Robert Gray, obtained at Mr Baillie's inſtance."

That before production of this letter, the ſheriff-ſubſtitute had found it incumbent on the petitioner to produce ſaid decreet of mails and duties, although it was on record in his own court, was not in the petitioner's poſſeſſion, and was compelling him, moſt improperly, to verify and inſtruct the defences urged againſt himſelf. However, it was hoped, that the above letter, from the perſon who had obtained ſaid decree, would have put

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an end to any future difficulty on this head: but the ſheriff-ſubſtitute, having made aviſandum with the proceſs, "circum-"duced the term againſt the petitioner for not production; and "aſſoilzied the defenders."

That this obliged the petitioner to raiſe advocation of his own cauſe, which was ſignet the 10th of Auguſt 1765. But Janet Paterſon, finding matters in this train, and that decree for payment of the arrears, or rather for the whole rent during her huſband's and her own poſſeſſion, would ſoon be recovered, which now amounted to ſix years, and to L. 114 Sterling; in order to evade this, ſhe brought a counter proceſs againſt the petitioner; ſetting forth, That in ſpring 1764, the petitioner, in manifeſt violation of the foreſaid tack ſet to her huſband, and without any order of law whatever, at his own hand, diſpoſſeſſed her of the foreſaid lands, and ſet the ſame, or part thereof, to ſundry perſons therein named; and thereupon concluding againſt the petitioner for L. 200 Sterling of damages, L. 50 Sterling for profits, and L. 50 Sterling yearly during the currency of the tack; as alſo againſt the tenants to whom the lands were ſet, for L. 30 Sterling of further damages. This ſummons was executed 16th October 1765, above two months after expeding ſaid advocation. Both the advocation and this proceſs were called, and at laſt debated, and conjoined by Lord Pitfour Ordinary.

That when the petitioner inſiſted, in his advocation, for payment of his rent, as alſo for removing, if caution was not found for the remaining years of the tack, then he was played off with the counter proceſs, that no decree for the acknowledged arrears of rent could be obtained till Janet Paterſon had liquidated her pretended damages, that thereupon ſhe might propone compenſation. This made it neceſſary to conjoin the two proceſſes; and the Lord Ordinary, before anſwer, allowed a conjunct probation of the various allegations of parties, to be reported to the Lord Ordinary.

That the facts which the petitioner intended to prove, in de-

fence againſt the violent poſſeſſion, were, That, in the end of the year 1763, Janet Paterſon and her ſon, being four years in arrears of rent, were deſired by the petitioner to give up the tack, and quit poſſeſſion: That William and Archibald Forreſts, and John Prentice, in conſequence of a letter from the petitioner, went and had a full converſation with Janet Paterſon; when ſhe conſented, in the moſt explicit manner, to give up the poſſeſſion of the lands of Over Hillhead; ſo that the petitioner might diſpoſe of it at his pleaſure: That in conſequence thereof, he advertiſed a public roup of the farm of Over Hillhead, to be held on the 7th of January 1764: That on that day it was put up in different parcels, and ſet for a year to the higheſt offerer: That Janet Paterſon was preſent at ſaid roup; and ſo far from diſapproving thereof, ſhe ſeemed ſatisfied with the proceedings, and was herſelf a bidder for one of the parcels, was preferred as the higheſt offerer, and gave a cautioner for the rent: That ſhe ſaw the ſeveral tenants enter to the poſſeſſion of their lots, labour, plough, and ſow the ſame, without interruption, or any manner of challenge: That therefore it was now too late for her to plead, that a warning to remove had not been regularly executed; for there was no *locus pœnitentiæ*, as matters were not now entire, but the lands ſet to others in the open and avowed manner above mentioned; in which ſhe herſelf was preſent, did homologate, and had approved, both before and at the roup, and for many months thereafter: At leaſt there could be no doubt, that ſo ſtanding the fact, there was not any ground for an action of damages.

That Janet Paterſon very well foreſaw, and was adviſed of theſe conſequences; and in order to elude them, fell upon this ingenious device. As ſhe had no defence againſt payment of the rent, after the advocation was expede, ſhe was adviſed to raiſe ſaid counter proceſs for damages. In which ſhe not only inſiſts againſt the petitioner, as the ſetter of the lands, but againſt ſaid William Forreſt, as the judge of the roup, and againſt ſaid Archibald Forreſt and John Prentice, as bidders at the roup; and

and who being preferred as the higheſt offerers, entered to the natural poſſeſſion without trouble or moleſtation; and concludes ſeverally againſt them in the manner above mentioned. Now, ſays ſhe, all theſe people are defenders, and are thereby incapacitate from being witneſſes for the petitioner, in my action of damages againſt him; and therefore he can bring no evidence of my conſent and agreement to give up the tack, and of many other intereſting circumſtances known to them alone at the roup and afterwards. In conſequence of this deliberate plan, when theſe witneſſes were cited, they are immediately objected to as defenders, and having an intereſt in the cauſe. And the Lord Ordinary, of this date, "having conſidered the foregoing ob- July 16. 1768.
"jections, with the anſwers thereto, and heard parties procu-
"rators thereupon; ſuſtains the objections, and finds the wit-
"neſſes objected to cannot be received." And the petitioner begs leave to reclaim ſhortly upon the following grounds.

That, 1*mo*, It is humbly ſubmitted, if this art of Janet Paterſon's is not evidently *fraudem facere legi*. 2*do*, It will have appeared, that theſe witneſſes are moſt neceſſary, being the ſole intercommuners with Janet, and the only perſons who can inform your Lordſhips with what was *actum et tractatum* in the conference with her, to which they were ſpecially called. 3*tio*, Theſe witneſſes, though nominally defenders, have in reality no intereſt whatſomever. They were invited by open proclamation, by the undoubted proprietor; they were offerers and purchaſers at a public roup; and were openly entered *in vacuam poſſeſſionem*, which they occupied peaceably by plowing and ſowing. Every ſtep is regular and legal on their part, and they cannot be liable for the ſuppoſed tortious acts of another. They are liable only for the rent, which they are willing to pay to the perſon having beſt right, whether the proprietor or the former tenant. But, 4*to*, Suppoſing, though not granting, they had an intereſt, it is not immediate and direct, but conſequential only, depending on the concluſion againſt the petitioner: and the ſame

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being found relevant, verified, and proven; and thereafter taking in so extensive a circle as to comprehend all those who have had any transaction with the petitioner in respect of the farm of Over Hillhead; an interest so consequential, so remote and invisible, has never been regarded by your Lordships, nor sustained as an objection against witnesses *omni exceptione majores.*

May it therefore please your Lordships, to alter the Lord Ordinary's interlocutor, to repel the objection, and to allow the witnesses to be received.

According to justice, *&c.*

DAV. DALRYMPLE.